No. 84-1279

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF DELAWARE, PETITIONER

v.

ROBERT E. VAN ARSDALL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

CHARLES FRIED
Acting Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
PAUL J. LARKIN, JR.
Assistant to the Solicitor General
VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether an erroneous restriction upon a defendant's opportunity to impeach an adverse witness by showing that he may be biased in favor of the prosecution requires that the defendant's conviction be set aside without any regard to whether the defendant was prejudiced by the error.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued Page

Cases—Continued Page

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1279

STATE OF DELAWARE, PETITIONER

v.

ROBERT E. VAN ARSDALL

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented by this case is whether an erroneous restriction upon a defendant's opportunity to impeach a witness by showing that he is biased in favor of the prosecution requires that the defendant's conviction be set aside without any consideration of whether the error was prejudicial. The Court's resolution of this issue will apply equally to federal and state prosecutions.

STATEMENT

Following a jury trial in Kent County, Delaware, Superior Court, respondent was convicted of first degree murder, in violation of Del. Code Ann. tit. 11, § 636(a)(1) (1979), and possession of a deadly weapon during the commission of a murder, in violation of Del. Code Ann. tit. 11, § 1447 (1979 & Supp. 1984). Respondent was sentenced to life imprisonment without the possibility of probation or parole on the murder conviction and to a consecutive 30-year term of imprisonment on the weapons charge (J.A. 2). On respondent's appeal, the Delaware Supreme Court reversed his convictions on the

ground that the trial judge had improperly restricted cross-examination of prosecution witness Robert Fleetwood in contravention of the Confrontation Clause of the Sixth Amendment (Pet. App. A1-A23).

1. Shortly after midnight on January 1, 1982, Doris Epps was stabbed to death in an apartment in Smyrna, Delaware, following a New Year's Eve party. Respondent and Daniel Pregent, the only persons in the apartment with Epps at the time that she was murdered, were arrested at the scene of the crime and were charged with Epps' murder. At separate trials, respondent was convicted and Pregent was acquitted.

a. On December 31, 1981, Pregent and Robert Fleetwood held a joint New Year's Eve party in their adjacent apartments (Pet. App. A2). The party lasted from late morning until shortly before midnight, and more than a dozen guests attended the party on and off during the course of the day (*ibid*; II Tr. 91-94; J.A. 73-80, 121-123). The victim of the murder, Doris Epps, joined the party at roughly 4:00 p.m. and stayed for the remainder of the day (II Tr. 93, 118-119; III Tr. 45, 56; J.A. 78-79, 88).[1] Respondent, an acquaintance of Fleetwood and Pregent (X Tr. 28), stopped briefly at the party during that day (Pet. App. A2; II Tr. 94; J.A. 79-80, 90).

At roughly 11:25 p.m., respondent returned to Pregent's apartment (III Tr. 29-33; X Tr. 18-41). By that time, the party was over. Pregent had quarreled with a female guest and had kicked a hole in a hallway wall (III Tr. 48). Epps had become intoxicated and passed out at about 10:30 p.m., and she was placed on a sofa bed in Pregent's living room (II Tr. 111-113). Afterwards, Pregent got into the bed with Epps, and everyone else left his apartment (II Tr. 107-108). Only Fleetwood, Alice Meinier, and Mark Mood remained in Fleetwood's apartment (III Tr. 49; IV Tr. 8-13; J.A. 95-96).

At approximately 11:30 p.m., a few minutes after respondent had returned to Pregent's apartment, Fleetwood walked across the hall, looked into Pregent's living room from the

[1] December 31 was the final day of Fleetwood's lease and the electricity had been turned off in his apartment (II Tr. 118, 130; III Tr. 52; IV Tr. 43, 50). Epps had briefly visited Fleetwood's apartment earlier that day to inquire about renting it (II Tr. 118, 123; III Tr. 45; J.A. 78-79).

doorway, and saw respondent sitting on the end of a sofa bed next to Pregent's feet (Pet. App. A3; III Tr. 50). Fleetwood, who did not have a complete view of the bed, did not see Epps or anyone else in the apartment; he returned to his own apartment without speaking to respondent or to Pregent (III Tr. 50-52, 66-67; J.A. 82-85). Shortly before midnight, Meinier walked across the hall from Fleetwood's apartment to check the clock in Pregent's kitchen.[2] The kitchen light was on and the clock indicated it was 11:53 p.m. (IV Tr. 14, 51). Meinier immediately returned to Fleetwood's apartment without looking into Pregent's living room, which was dark (IV Tr. 14). Fleetwood fell asleep on his couch a few minutes after nearby church bells had chimed in the New Year, but Meinier and Mood remained awake talking in Fleetwood's apartment (III Tr. 53; J.A. 125-128).

Roughly one hour later, respondent knocked at Fleetwood's door, and Meinier admitted him (IV Tr. 17). Respondent's shirt and hands were splattered with blood, and he was holding a long, blood-covered knife (*id.* at 17-20). Respondent stated that "he had gotten in a fight" but that he "got them back" (*id.* at 19, 61-62). After Mood took the knife from respondent's hand, Meinier suggested that respondent wash his hands in the kitchen sink (*id.* at 21-22). Respondent placed his wrist watch, which was blood soaked and had a piece of human tissue clinging to it, on the counter next to the sink and washed his hands. Respondent then said, "I think there's something wrong across the hall." Meinier went to Pregent's apartment and discovered Epps' body lying in a pool of blood on the kitchen floor. Mood then summoned the police (IV Tr. 65; J.A. 128-134).

The police saw Epps' disemboweled and mutilated body on Pregent's kitchen floor clad only in a sweater and bra. The kitchen floor, appliances, and cabinets were splattered with

[2] Meinier did so because Fleetwood's apartment was without electricity and she had no way of knowing how close it was to the New Year (J.A. 125).

blood and tissue.[3] Blood smears led from the kitchen to Pregent's blood-drenched sofa bed, on which the police found Pregent wrapped in a blanket. The murder weapon, a twelve-inch serrated kitchen knife with a seven and one-half inch blade, and respondent's watch were recovered, respectively, from Fleetwood's sink and from his counter top (IV Tr. 111-115, 122-123, 130-136, 140-141; V Tr. 8; VI Tr. 72). At the scene, respondent, whose clothes and shoes were blood-splattered, explained to the police that he had gotten covered with blood "trying to help the woman" (IV Tr. 84-87). Respondent also stated that he "didn't think it would go like this" (VII Tr. 72). Both respondent and Pregent were arrested.

b. Later that morning at the police station, respondent made a tape-recorded statement (J.A. 10-34). According to his statement, respondent arrived at the party at Pregent's apartment in the late afternoon and left at roughly 6:00 p.m. (J.A. 21-22). After "riding around" with some friends, drinking "[q]uite a bit," and visiting another friend's home outside of town, respondent returned to Pregent's apartment near midnight (J.A. 10, 19, 21-22). He ate a couple of sandwiches, talked with Pregent for a while, and then went to sleep on cushions near Pregent's sofa bed; Pregent got into the sofa bed with Epps (J.A. 12, 22-23, 28-30). Respondent soon felt sick and went into the hall to get some air, noticing nothing unusual in Pregent's apartment (J.A. 11, 14, 22, 30). Shortly thereafter, a woman [*i.e.*, Meinier] stepped out of Fleetwood's apartment and stated that she had heard a noise (J.A. 23, 31). Respondent followed Meinier into Pregent's apartment and found Epps' body on the kitchen floor. Respondent became soaked with Epps' blood when he tried to help Epps, and he washed the blood off his hands in Fleetwood's kitchen sink (J.A. 13-14, 23-24, 26-27, 31). Respondent also claimed that he had lost his Timex watch sometime after 10:30 p.m. on New Year's Eve (J.A. 11, 21); he denied

[3] The medical examiner estimated that Epps died between midnight and 1:00 a.m. (II Tr. 66, 80). Epps had been stabbed or cut 18 times in various parts of her body, including the neck, heart, and vaginal area, and one of the wounds was a two-foot long incision from the top of the sternum to the pelvic area (*id.* at 58-65).

that he had ever held a knife that evening (J.A. 26) or that he had sexual intercourse with anyone the night of the crime (J.A. 18); and he attributed scratches on his arm to his having played that night with Pregent's cat (J.A. 15-16).

In another tape-recorded statement given to the police two days later (J.A. 36-41), respondent retracted most of his earlier statement, explaining that he had lied in order to "cover up for my buddy [Pregent]" (J.A. 36). According to respondent's revised version of the facts, he returned to Pregent's apartment at about 11:30 p.m. (J.A. 37). Pregent lay down on the sofa bed with Epps, and respondent lay down on some adjacent cushions (J.A. 37). After respondent heard noises indicating that Pregent and Epps were engaged in sexual intercourse, respondent fell asleep (J.A. 39-40). Respondent was later awakened by Pregent dragging Epps' body past his feet into the kitchen (J.A. 37, 40). When respondent arose to investigate, Pregent struck him, "daz[ing him] for a while" (J.A. 37). Respondent then saw Pregent repeatedly stab Epps in the kitchen; when respondent tried to pull Pregent away from Epps, Pregent knocked him down (J.A. 37-38). After Pregent ended his attack on Epps, he washed himself off and went back to bed (J.A. 38-39). Respondent then pulled the knife from Epps' body, walked across the hall to Fleetwood's apartment, and told Meinier and Mood that he had been in a fight (J.A. 39).[4]

c. Both of respondent's statements were introduced at trial (VII Tr. 84-85). The State also introduced several types of physical evidence and the testimony of a forensic expert

[4] Pregent also made two tape-recorded statements following his arrest, which were admitted at trial without objection. In essence, Pregent stated that, after talking with respondent and after respondent had "stretched out on some cushions," he [Pregent] fell asleep on the sofa bed next to the fully-clothed Epps. Pregent could not sleep and went to Fleetwood's apartment. When Pregent returned five minutes later, respondent was still awake and "everything was still fine." Pregent then got back into bed with Epps and "the next thing [he] knew," he was awakened and arrested by the police. Pregent claimed that he did not see Epps' body until after he had been taken into custody, and he denied having had sexual intercourse with Epps (J.A. 43-44, 46-47, 52-53, 56).

(*e.g.*, VI Tr. 23-109). According to this expert, the blood found on the knife and watch recovered from Fleetwood's apartment, as well as the blood staining the clothes that respondent was wearing when he was arrested, matched Epps' blood type (VI Tr. 34-49, 56-60, 72, 107-108; IX Tr. 12-13, 16).[5] In addition, fibers matching the fibers of Epps' sweater and one "Negro" pubic hair, like that of Epps, were found on respondent's jockey shorts (VI Tr. 4-42, 54).[6]

d. The prosecution called Robert Fleetwood as a witness. In his direct testimony, Fleetwood recounted uncontroverted facts regarding the party and respondent's presence at Pregent's apartment the afternoon of New Year's Eve and again later that night an hour or so before Epps was killed (III Tr. 40-54). In all significant respects, Fleetwood's testimony was corroborated by other witnesses, including respondent, whose own testimony placed him at Pregent's apartment at about the same times that Fleetwood placed him there (II Tr. 94; X Tr. 29, 33; J.A. 140-142).

Near the end of Fleetwood's cross-examination, defense counsel sought to impeach Fleetwood by questioning him about the dismissal of a misdemeanor charge against him—being drunk on a highway—after he had agreed to speak with the prosecutor about Epps' murder (III Tr. 69). When the prosecutor objected to that inquiry on relevancy grounds, the trial court allowed counsel to voir dire Fleetwood on the matter (*id.* at 70-88). Fleetwood acknowledged that the drunkenness charge was dropped in exchange for his promise to speak with the prosecutor regarding Epps' murder, but he

[5] The pants Pregent was wearing when he was arrested were stained with blood on the bottom of both legs, indicating that he had stepped into a large pool of blood (VI Tr. 54-65, 109). A T-shirt recovered from a water-filled trash can in Pregent's bathroom had a "very little bloodstain" that was "smeared and diluted"; a towel and a pair of socks also found in the trash can had no blood on them (VI Tr. 65-67; VII Tr. 43; IX 37-38).

[6] Based on the physical evidence and photographs of the crime scene, the forensic expert concluded that Epps had initially been stabbed in Pregent's living room next to the sofa bed, that she then fell or was placed o.. the sofa bed and later dragged by her shoulders into Pregent's kitchen, where additional wounds were inflicted (VI Tr. 89-96). Epps' pants and panties had been removed before she was assaulted (*id.* at 105).

denied that the agreement had an effect on his testimony (*id.* at 75-76; J.A. 100-107).[7] The trial court disallowed any cross-examination about that agreement (III Tr. 82; J.A. 110) and also refused to permit defense counsel to cross-examine Fleetwood about his being questioned by the police in connection with an unrelated homicide that had occurred after Epps' murder (III Tr. 83-88; J.A. 111-115).[8]

e. Respondent was the only defense witness. As in his second statement to the police, respondent attributed Epps' murder to Pregent (X Tr. 17-90). Respondent admitted that he had visited the party twice during the day and that he returned shortly before midnight.[9] Once there, respondent ate, talked with Pregent, and played with Pregent's cat (X Tr. 43-47). After Pregent left the living room, respondent had sexual intercourse with Epps on the sofa bed at her invitation.[10] Afterwards, Pregent lay down on the bed with Epps, and respondent reclined on some nearby cushions (*id.* at 47-49). Before he fell asleep, respondent heard Pregent and Epps engaged in sexual intercourse (*id.* at 49-50). Respondent's sleep was interrupted by Pregent dragging Epps's limp body past respondent's feet (*id.* at 50-51). When respondent asked Pregent what was going on, Pregent struck him (*id.* at 51). Respondent then saw "dark stuff" on the floor,

[7] Fleetwood stated that on the night of the crime he gave a statement to the police that was basically identical to his trial testimony (J.A. 105).

[8] Additional voir dire was conducted regarding the unrelated homicide; Fleetwood denied that he had been offered any favors, inducement, promises, or deals with respect to that homicide in exchange for his testimony at respondent's trial (III Tr. 85-86; J.A. 113-114).

[9] Respondent testified that he had known Fleetwood and Pregent for a few years and that Pregent had invited him to the party when they met on the street on the afternoon of December 31, 1981 (X Tr. 26). Respondent went to Pregent's apartment, met Epps for the first time, and left after 30 minutes (*id.* at 28-31). Later that afternoon, respondent returned to the party, but left a short time later (*id.* at 33-35). After spending the remainder of the afternoon and evening drinking with friends, respondent returned to Pregent's apartment (*id.* at 35-41; J.A. 140-142).

[10] No seminal fluid was found on any item of Epps' clothing or on any other item that was analyzed by the government's forensic expert (VI Tr. 42). The medical examiner did not state, however, whether any fluid was found on Epps (II Tr. 52-88).

put on his shoes because the floor "was wet," and walked to the doorway of the kitchen (*id.* at 51-52). Respondent saw Pregent squatting over Epps in the kitchen, stabbing and cutting her (*id.* at 52-53). Respondent grabbed Pregent, but was knocked down (*id.* at 53-54).[11] The next thing respondent remembered was seeing Pregent exit the utility room of the apartment (*id. at* 54). When Pregent walked back to the living room, respondent pulled the knife from Epps' body—to protect himself from Pregent, respondent claimed (*id.* at 56, 70-71)—and went to Fleetwood's apartment to get help (*id.* at 57-58). After washing the blood off his hands in Fleetwood's kitchen sink (*id.* at 59), respondent and Meinier went to Pregent's apartment, and respondent checked Epps's wrist for a pulse (*id.* at 60-61). Finding none, they returned to Fleetwood's apartment and tried unsuccessfully to wake up Fleetwood (*id.* at 61-62).

Defense counsel admitted in their opening and closing arguments to the jury that respondent was present at Pregent's apartment when Epps was killed (J.A. 62, 64-65, 181, 188-189, 192-194).[12] In closing argument, defense counsel also said that none of the five prosecution witnesses who were present that night, including Fleetwood, "testified to any fact suggesting anything other than that [respondent] was in that apartment" (J.A. 189).

2. On appeal to the Delaware Supreme Court, respondent argued that the trial court had erroneously denied him the right to establish Fleetwood's bias by limiting his cross-

[11] One of the arresting officers testified that he saw no bruises on respondent (X Tr. 95).

[12] For example, counsel told the jury in closing argument (XI Tr. 32, 42; J.A. 181, 188-189):

> The defense does not dispute that [respondent] was in Daniel Pregent's apartment and [respondent] was there when the murder occurred. There is no dispute about that.
>
> * * * * *
>
> [Fleetwood's testimony] proves what [respondent] has never denied. It proves what [respondent] has already testified to in this trial. It proves that [respondent] was at Danny Pregent's apartment before Doris Epps was murdered.

examination. Relying in part upon *Davis* v. *Alaska*, 415 U.S. 308 (1974), the court reversed respondent's convictions on the ground that the trial judge's ruling barring any cross-examination of Fleetwood regarding the dismissal of the misdemeanor charge violated the Confrontation Clause by keeping from the jury facts regarding bias that were central to assessing Fleetwood's credibility. Pet. App. A5-A6.[13] In so doing, it rejected the State's argument that, since "Fleetwood's basic testimony was cumulative in nature and unimportant," the Confrontation Clause error was harmless beyond a reasonable doubt (Pet. App. A6). The court held that "a blanket prohibition against exploring potential bias through cross-examination" is "a per se error," that "the actual prejudicial impact of such an error is not examined," and that "reversal is mandated" (*id.* at A7).

SUMMARY OF ARGUMENT

It is a basic principle of modern American law—applicable equally to criminal as to civil cases, and to both constitutional and non-constitutional claims—that an appellant is not entitled to a reversal of the trial court's judgment unless he can show not only the existence of an error, but also some likelihood that the error was prejudicial to him (*i.e.*, that it was not "harmless"). It is therefore customary for appellate courts to reverse only upon finding a sufficient probability that the result would have been different but for the error. In this case, however, the Delaware Supreme Court held that this principle may not be applied where there has been an erroneous restriction of the defendant's right to show that a prosecution witness is biased, on the ground that the Sixth Amendment prohibits affirmance of a conviction in such circumstances even if it can be demonstrated that the restriction on cross-examination could not have affected the outcome of the trial.

[13] The court left open the question whether denying respondent an opportunity to cross-examine Fleetwood about the unrelated homicide investigation was also erroneous. Pet. App. A6 n.3.

It is of course true that certain errors will always require reversal without separately considering whether a likely effect on the verdict has been demonstrated. For example, a trial before a biased tribunal, the denial of counsel, or the denial of a jury trial can never be "harmless," despite indisputable proof of the defendant's guilt, because the proceeding at which he was convicted lacked the fundamental attributes of a trial as we know it. Or, to consider a somewhat different class of cases, harmless error analysis would be pointless where the standard for determining whether there was any error at all already turns in part on a finding of prejudice, as in *Brady* claims. Finally, there may be instance in which prejudice is presumed (and harmless error inquiry thus foreclosed) because of the violation of an important right designed to protect the defendant against an unjust conviction in circumstances in which is it impossible to determine the actual or probable effect of the error.

Denying a defendant the opportunity to impeach an adverse witness does not fit into any of those limited categories of errors requiring automatic reversal. Confrontation by means of impeachment is valued not as an end in itself, but as a means to the end of enhancing the reliability of the verdict. It is thus entirely appropriate, upon finding an improper restriction on impeachment of an adverse witness, to determine whether successful impeachment of the witness's credibility might have affected the verdict. That inquiry is not inherently impracticable. Whether an error of this type is prejudicial hinges upon a variety of factors—such as the nature of the testimony that the witness has given, the nature and strength of the alleged bias, and the defense offered at trial—which will necessarily vary from case to case. Moreover, because impeachment is simply one of several means to an end, denying a defendant the opportunity to impeach a witness does not invariably deprive the accused of the benefits of confrontation. Finally, as was the case here, the testimony given by a particular witness may be so insignificant or may be so indisputably accurate in light of other, corroborating evidence that the denial of an opportunity to impeach that witness cannot reasonably be said to have deprived the defendant of a fair opportunity to establish his innocence.

ARGUMENT

THE ERRONEOUS RESTRICTION OF A DEFENDANT'S OPPORTUNITY TO DEMONSTRATE BIAS ON THE PART OF A PROSECUTION WITNESS DOES NOT REQUIRE AUTOMATIC REVERSAL WITHOUT REGARD TO PREJUDICE

We have no quarrel with the ruling by the court below that, once the State chose to call Robert Fleetwood as a witness, respondent should have been allowed to impeach him by bringing out the fact that Fleetwood's cooperation may have been induced by the dismissal of his pending misdemeanor charge. Nevertheless, we think it indisputable that this error could not possibly have affected the jury's verdict in light of the marginal significance of the facts to which Fleetwood testified and their corroboration in all material respects by the testimony of other witnesses, including the state's forensic expert, by physical evidence, and by respondent's own statements to the police and his trial testimony.[14] See pages 4-8, *supra*. The Delaware Supreme Court did not suggest otherwise, but instead declined to consider whether the error may have been prejudicial. Relying upon *Davis* v. *Alaska*, 415 U.S. 308 (1974), it concluded that the Constitution requires automatic reversal whenever a defendant is improperly precluded from bringing out the possible bias of a prosecution witness. This holding, which conflicts with the majority of federal and state court rulings on the subject, is wrong.[15]

---

[14] Given respondent's admissions to the police and defense counsel's statements at trial (see pages 4-5, 8, *supra*), respondent cannot claim that his trial testimony was in any way the "fruit" of the restriction on cross-examination. Cf. *Harrison* v. *United States*, 392 U.S. 219 (1968).

[15] Since *Davis* was decided, most federal and state courts have held that an erroneous restriction on a defendant's opportunity to cross-examine an adverse witness can be harmless. See, *e.g.*, *United States* v. *Garza*, 754 F.2d 1202, 1206-1208 (5th Cir. 1985); *United States* v. *Smith*, 748 F.2d 1091, 1096 (6th Cir. 1984); *Carrillo* v. *Perkins*, 723 F.2d 1165, 1170-1173 (5th Cir. 1984); *United States* v. *Whitt*, 718 F.2d 1494, 1501-1502 (10th Cir. 1983); *United States ex rel. Scarpelli* v. *George*, 687 F.2d 1012, 1013-1014 (7th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); *Kines* v. *Butterworth*,

A. It is well settled that the Constitution does not guarantee a defendant a perfect trial and that not every error that occurs prior to or at trial requires that the defendant's conviction be set aside as the remedy. That uncontroversial principle recognizes that "[a]bsent [an actual or threatened adverse] impact on the criminal proceeding, * * * there is no basis for imposing a remedy in that proceeding" (*United States* v. *Morrison*, 449 U.S. 361, 365 (1981)) as well as that " ' remedies should be tailored to the injury suffered . . . and should not unnecessarily infringe on competing interests' " (*Rushen* v. *Spain*, 464 U.S. 114, 118 (1983) (quoting *Morrison*, 449 U.S. at 364)). The harmless error doctrine, as it has come to be known, is merely one application of this principle.

In *Chapman* v. *California*, 386 U.S. 18 (1967), the Court rejected the argument that all federal constitutional errors, regardless of their nature or severity or the strength of the government's proof of the defendant's guilt, must be deemed

669 F.2d 6, 11-13 (1st Cir. 1981), cert. denied, 456 U.S. 980 (1982); *United States* v. *Gambler*, 662 F.2d 834, 840-842 (D.C. Cir. 1981); *United States* v. *Duhart*, 511 F.2d 7, 9-10 (6th Cir.), cert. dismissed, 421 U.S. 1006 (1975); *Snyder* v. *Coiner*, 510 F.2d 224, 227-229 (4th Cir. 1975); *Ransey* v. *State*, 680 P.2d 596, 597-598 (Nev. 1984); *State* v. *Patterson*, 656 P.2d 438, 439 (Utah 1982); *State* v. *Pierce*, 64 Ohio St.2d 281, 414 N.E.2d 1038, 1043-1044 (1980); cf. *Commonwealth* v. *Wilson*, 381 Mass. 90, 407 N.E.2d 1229, 1247 (1980). Contra, *State* v. *Parillo*, 480 A.2d 1349, 1357-1358 (R.I. 1984). The Ninth Circuit is in disarray on this issue. Compare *United States* v. *Uramoto*, 638 F.2d 84, 87 (9th Cir. 1980) (stating that such errors cannot be harmless; witness in that case was crucial, however), with *United States* v. *Price*, 577 F.2d 1356, 1362-1364 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979) (such errors can be harmless); *Patterson* v. *McCarthy*, 581 F.2d 220, 221-222 (9th Cir. 1978) (finding that error was not harmless in that case). See also *United States* v. *Jackson*, 756 F.2d 703, 706 (9th Cir. 1985) (per se rule of reversal stated in *Uramoto* may be limited to denial of cross examination that is prejudicial); *United States* v. *Williams*, 668 F.2d 1064, 1070 & n.14 (9th Cir. 1981) (noting "disharmony in this circuit surrounding that issue"; reversing on ground that restriction was prejudicial); *Chipman* v. *Mercer*, 628 F.2d 528, 533 (9th Cir. 1980) (erroneous restriction on cross-examination cannot be harmless because defendant must show that the verdict was adversely affected by the restriction to establish a Confrontation Clause violation).

inherently prejudicial, requiring reversal of a judgment of conviction. The Court reasoned that in the context of a particular case a given error may have had little, if any, likelihood of skewing the factfinding process at trial and that where a reviewing court may confidently say that no such effect occurred, the reversal of a conviction provides an unjustified windfall for the defendant. 386 U.S. at 21-24; see *United States* v. *Hasting*, 461 U.S. 499, 508-509 (1983).[16] Since *Chapman*, the Court has repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the constitutional error that occurred before or during trial was harmless.[17] Indeed, in *Hasting* the Court made clear that "it is the *duty* of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless." 461 U.S. at 509 (emphasis added); see also 28 U.S.C. 2111; Fed. R. Crim. P. 52(a).

The harmless error doctrine furthers several fundamental interests in the administration of criminal justice. It gives effect to the principle that the essential purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence (*United States* v. *Nobles*, 422 U.S. 225, 230 (1975)), rather than merely to deliver a preliminary answer to

[16] As the Court explained in *Hasting*, the harmless error doctrine recognizes that, "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial." 461 U.S. at 508-509.

[17] See, *e.g.*, *Rushen* v. *Spain*, *supra* (right to be present at trial); *United States* v. *Hasting*, *supra* (improper comment on defendant's silence at trial, in violation of Self-Incrimination Clause); *Hopper* v. *Evans*, 456 U.S. 605, 613-614 (1982) (statute improperly forbidding court from giving a jury instruction on a lesser included offense in a capital case, in violation of Due Process Clause); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of identification in violation of Sixth Amendment Counsel Clause); *Brown* v. *United States*, 411 U.S. 223, 231-232 (1973) (admission of out-of-court statement in violation of Sixth Amendment Confrontation Clause); *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession in violation of Sixth Amendment Counsel Clause); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of Fourth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (denial of right to counsel at a preliminary hearing in violation of Sixth Amendment Counsel Clause).

allegedly more important abstract legal questions that will ultimately be resolved on appeal (cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977)). It also ensures that the criminal process is not treated as a "game" by removing incentives for defense counsel to attempt to sow technical errors at trial for the sole purpose of obtaining a reversal on appeal. See *Kotteakos* v. *United States*, 328 U.S. 750, 759 (1946). It promotes public respect for the criminal process by focusing on the underlying fairness of the trial, rather than on immaterial technicalities. See *Hasting*, 461 U.S. at 509; *Kotteakos*, 328 U.S. at 759-760; R. Traynor, *The Riddle of Harmless Error* 14, 50 (1970). The doctrine also contributes to the finality that is essential if punishment is to serve its intended purpose. Cf. *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting). Finally, it conserves scarce trial resources by eliminating burdensome retrials where correction of the error is not likely to improve the reliability of the verdict, but may instead inject new errors. See *Hasting*, 461 U.S. at 509. In essence, by eliminating needless retrials where it can be confidently said that no materially prejudicial error occurred at trial, the harmless error doctrine allows an appellate court "to keep the balance true" (*Snyder* v. *Massachusetts*, 291 U.S. 97, 122 (1934)) between the government's interest in convicting the guilty and a defendant's interest in avoiding an unjust conviction. See *Hasting*, 461 U.S. at 509; cf. *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 24.

At the same time, the Court has recognized that some constitutional rights are so essential to a fair trial that their violation warrants reversal in every case. *Chapman* itself gave three examples of such infractions. 386 U.S. at 23 n.8. Two of them—compelling a defendant to stand trial before a trier of fact with a financial interest in the outcome (see *Tumey* v. *Ohio*, 273 U.S. 510 (1927)) and denying a defendant the assistance of counsel at trial (see *Gideon* v. *Wainwright*, 372 U.S. 335 (1963))—strike at the heart of the modern concept of a criminal trial. Their deprivation is properly viewed as functionally equivalent to the denial of any trial at all. Cf. *Drope* v. *Missouri*, 420 U.S. 162, 171 (1975) (forcing a

mentally-incompetent defendant to stand trial); *Moore* v. *Dempsey*, 261 U.S. 86, 91 (1923) (mob dominated trial).[18] The third error listed in *Chapman*—introducing a coerced confession (see *Payne* v. *Arkansas*, 356 U.S. 560 (1958))—is likely to call into question the reliability of the verdict in a manner that is is not susceptible to effective appellate review.[19] An error like this necessarily undermines an appellate court's confidence in the accuracy of the verdict. Cf. *Strickland*, slip op. 24.

The final category of errors that, once found to have occurred, will not be separately analyzed for harmlessness is defined in an entirely different manner. This class consists of

---

[18] Analogous errors or deprivations that would appear to require reversal without regard to their specific impact upon the defendant's trial include denying the defendant a jury trial, trying a defendant in absentia, or refusing to permit the defendant to testify. Whether a jury charge that shifts the burden of proof on, or conclusively presumes, the issue of the defendant's intent fits into this category hinges upon whether such a charge amounts to a directed verdict of guilty. Compare *Connecticut* v. *Johnson*, 460 U.S. 73, 84-88 (1983) (plurality opinion), with *id.* at 94-102 (Powell, J., dissenting). The right to represent oneself at trial (see *Faretta* v. *California*, 422 U.S. 806 (1975)) may also fit into this category, since it is an integral component of the defendant's right to present a defense at trial (*id.* at 818-821), or it may be in a class by itself, because the right exists, in part at least, "to affirm the dignity and autonomy of the accused" (*McKaskle* v. *Wiggins*, No. 82-1135 (Jan. 23, 1984), slip op. 7; *id.* at 9; *id.* at 11 n.6 (White, J., dissenting)).

[19] As Justice Harlan put it in *Chapman*, "particular types of errors have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless." 386 U.S. at 52 n.7 (dissenting opinion). However, given the Court's subsequent decisions in *Harrington* v. *California*, 395 U.S. 250 (1969), and *Milton* v. *Wainwright*, *supra*, it is presently unclear whether the admission of a coerced confession still fits into the class of errors that cannot be harmless.

Justice Harlan also suggested that "certain types of official misbehavior" should warrant reversal in every case to indicate society's disapproval of "such intentional misconduct." 386 U.S. at 52 n.7 (dissenting opinion). However, the Court rejected that approach to the harmless error doctrine in *Hasting*. See 461 U.S. at 507 ("the interests preserved by the doctrine of harmless error cannot be so lightly and casually ignored in order to chastise what the court viewed as prosecutorial overreaching"); see also *Mabry* v. *Johnson*, No. 83-328 (June 11, 1984), slip op. 6; *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982).

those matters as to which prejudice is considered in the determination whether there has been an error. See, *e.g.*, *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 10-15 (*Brady* claims); *Strickland*, slip op. 21-26 (ineffective assistance of counsel); *United States* v. *MacDonald*, 435 U.S. 850, 858 (1978) (speedy trial claims); cf. *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 15 n.14 (plain error under Fed. R. Crim. P. 52(b)). The reason that such claims cannot be harmless, of course, is that it is pointless to undertake a separate inquiry into whether an error had an effect upon the outcome of the trial if the defendant has already established that the error was prejudicial in demonstrating its existence.[20]

B. The question in this case is how the error at respondent's trial should be classified. In ruling that this error could not be harmless, the Delaware Supreme Court did not suggest that it could be classified among those constitutional violations that so far deny a defendant the essentials of a trial as to preclude a valid conviction without regard to the reliability of the verdict. That argument also could not be seriously entertained; perhaps a blanket refusal to permit cross-examination of all prosecution witnesses could rationally be treated like a deprivation of counsel or trial before a biased tribunal, but an erroneous restriction upon defense cross-examination of a particular witness simply cannot be equated with denial of a meaningful trial. Nor can the right to impeach a prosecution witness be compared with something like the right to represent oneself at trial, which is a right wholly unrelated to the reliability of the verdict. The purpose of the Confrontation Clause is to enhance the reliability of the factfinding process at trial, not to recognize the dignity and

[20] While a showing of prejudice is not an absolute prerequisite to establishing a speedy trial violation (see *Barker* v. *Wingo*, 407 U.S. 514, 530-533 (1972)), because consideration of prejudice nonetheless plays a central role in evaluating the claim, this too is a category of cases in which it is fair to say that the harmless error principle has in effect been folded into the decision whether there was an error.

autonomy of the accused. See, *e.g.*, *Tennessee* v. *Street*, No. 83-2143 (May 13, 1985), slip op. 6; *Ohio* v. *Roberts*, 448 U.S. 56, 63-64 (1980).

In determining that the Confrontation Clause was violated, the Delaware Supreme Court did not require respondent to demonstrate that the restriction actually and materially prejudiced his defense.[21] This case therefore also does not fit into the category in which any error that occurs cannot be harmless because prejudice has already been found in determining that an error existed.

Because the purpose of the Sixth Amendment is to ensure that a defendant receives a fair trial, there is generally no reason to award a defendant relief based upon a Sixth Amendment claim absent a showing of a likely adverse effect upon the reliability of the trial process. See *United States* v. *Cronic*, No. 82-660 (May 14, 1984), slip op. 9-10; *Morrison*, 449 U.S. at 364-365.[22] Ordinarily, this means that only those

[21] Although the court stated that "[t]he question of bias was an important issue before the [trial] court and the excluded evidence was central to that issue" (Pet. App. A5-A6 (footnote omitted)), the court did not suggest that the error was likely to have adversely affected the verdict, which is an essential aspect of either a determination of prejudice or harmless error analysis. Compare, *e.g.*, *Strickland*, slip op. 29-30, with *Hasting*, 461 U.S. at 512.

[22] In several contexts, the Court has ruled that a showing of prejudice is necessary before there is a Sixth Amendment violation or before a defendant can obtain relief. See, *e.g.*, *Strickland*, slip op. 21 (ineffective assistance of counsel); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872-874 (1982) (claimed violation of Compulsory Process Clause based upon deportation of potential witness); *United States* v. *MacDonald*, 435 U.S. 850, 858-859 (1978) (prejudice important in showing a violation of Speedy Trial Clause); *Weatherford* v. *Bursey*, 429 U.S. 545 (1977) (prejudice necessary to establish a violation of Counsel Clause by using co-defendant as government informant); see also *Morrison*, 449 U.S. at 364-365 (general rule is that an error does not warrant setting aside a conviction absent a demonstrable effect upon the outcome of the trial); see generally *Cronic*, slip op. 9-10 ("we begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated"). The same principle also applies in a variety of other contexts. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783 (1977) (proof of actual prejudice required to establish a due process violation arising from pre-indictment delay).

errors that may have produced an inaccurate guilty verdict in the case at hand require that a defendant receive a new trial. See, *e.g.*, *Strickland*, slip op. 21-26.[23] The decisions of this Court leave open the possibility that a showing of actual prejudice from an erroneous restriction on cross-examination is intrinsic to finding a Confrontation Clause violation in the first place.[24] Indeed, a substantial argument, supported by the mode of analysis employed in *Davis* v. *Alaska*, can be presented in favor of that rule.[25]

---

[23] That is not always the case, however; denial of a jury trial would not be harmless despite irrefutable proof of a defendant's guilt. The purposes of each particular Sixth Amendment guarantee must be examined to make this determination. The severity of the deprivation may also be pertinent. A complete denial of counsel requires automatic reversal without any showing of particularized prejudice (*Gideon* v. *Wainwright*, 372 U.S. 335 (1963)), whereas claims that particular acts or omissions of counsel deprived the defendant of his Sixth Amendment rights are evaluated with specific reference to potential prejudice (*Strickland*, slip op. 21-23; *Cronic*, slip op. 11 n.26).

[24] The Court's decisions involving a direct restriction on a defendant's cross-examination have involved situations in which either the witness gave particularly incriminating testimony or the defendant was denied the opportunity to elicit especially favorable exculpatory evidence. See, *e.g.*, *Davis* v. *Alaska*, 415 U.S. at 310-314, 317-318; *Chambers* v. *Mississippi*, 410 U.S. 284, 291-293 (1973); *Smith* v. *Illinois*, 390 U.S. 129, 130 (1968); *Brookhart* v. *Janis*, 384 U.S. 1, 2-4 (1966). Similarly, the Court's decisions regarding the admission of statements, such as a confession or prior testimony, made by a declarant not subject to cross-examination at trial have also involved highly damaging evidence. See, *e.g.*, *Barber* v. *Page*, 390 U.S. 719, 720 (1968); *Brookhart* v. *Janis*, 384 U.S. at 2, 4; *Douglas* v. *Alabama*, 380 U.S. 415, 416-417, 419 (1965); *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965). Some older cases not involving the Confrontation Clause either state or suggest that the denial of an opportunity for effective cross-examination will itself be treated as prejudicial. See, *e.g.*, *Alford* v. *United States*, 282 U.S. 687, 692 (1931); *Tla-Koo-Yel-Lee* v. *United States*, 167 U.S. 274, 277-278 (1897). But, in these cases as well, the witness involved gave damaging testimony against the accused, and the defense had a strong reason for pursing a particular line of inquiry. In any event, even if these decisions are read to suggest that a defendant need not show that the restriction might have affected the verdict to establish a confrontation violation, that would not foreclose application of the harmless error doctrine.

[25] A parallel could be drawn to the different rules governing cases like *Gideon*, *Powell* v. *Alabama*, 287 U.S. 45 (1932), and *Strickland*. There, the

Respondent's conviction was reversed without regard to the existence of case-specific prejudice arising from the restriction upon his cross-examination of Fleetwood. There is accordingly no need to decide in this case whether, if prejudice must in fact be shown in order to justify reversal, that is because prejudice is an element of the finding of error itself or because it is the criterion for deciding whether the error requires reversal.[26] Rather, the question here is whether a non-prejudicial restriction on cross-examination compels reversal. The affirmative answer of the Delaware Supreme Court would be correct only if this type of error is so inherently prejudicial and so indeterminate that it necessarily undermines an appellate court's confidence in the reliability of the verdict and prevents the court from effectively determining whether the error had an adverse effect on the trial. For the following reasons, we believe that the denial of an opportunity to impeach a prosecution witness regarding bias does not fit into this category.

1. The Delaware Supreme Court relied in part on *Davis* v. *Alaska*, *supra*, for its holding that this error was prejudicial per se. Pet. App. A6. Properly read, however, *Davis* does not stand for the proposition that an erroneous restriction on

---

question whether prejudice would be presumed hinged upon the degree of the interference with the right to counsel; here, the question would turn upon the degree of interference with a defendant's opportunity to confront adverse witnesses. The complete denial of any opportunity to cross-examine any adverse witness would be conclusively presumed to result in prejudice. See *Brookhart*, 384 U.S. at 3. Prejudice would be presumed where a defendant was denied the opportunity, in truth or effect, to cross-examine a crucial adverse witness. See *Davis* v. *Alaska*, *supra*; *Smith* v. *Illinois*, *supra*; *Alford* v. *United States*, *supra*. Finally, the denial of any opportunity to cross-examine a minor witness (*e.g.*, one who gave cumulative or undisputed testimony) or a particular restriction upon cross-examination of a more important witness would call for a case-specific inquiry into potential prejudice. This case would appear to fit into the third category.

[26] This point could be of significance if the outcome of the case depended upon an allocation of the burden of proof, since the prosecution would likely be allocated the burden of showing harmless error. Here, the State's effort to assume that burden was rejected by the court below on the ground that a showing of harmlessness would not avoid reversal.

defense cross-examination or impeachment invariably requires reversal and does not preclude application of the harmless error doctrine in this case.

Davis is best understood in light of its facts. Davis was charged with burglary and grand larceny for the theft of a safe from a bar. The police found the safe that Davis had allegedly stolen abandoned near Richard Green's home, and Green, the only eyewitness, testified that he had seen Davis near this site on the day of the crime. The defense was forbidden from eliciting on cross-examination of Green that he was on juvenile probation for burglary both at the time of the offense charged against Davis and at the time of the trial. The defense sought to reveal this fact to impeach Green for bias by showing that he may have slanted his testimony in the State's favor to shift suspicion away from himself or to avoid revocation of his probation for not "cooperating" with the prosecutor. 415 U.S. at 310-311. The trial judge, relying upon state rules forbidding the disclosure of juvenile records in judicial proceedings, prohibited questioning that would disclose Green's juvenile record. *Id.* at 311.

This Court reversed Davis's conviction. It explained that the opportunity to impeach a prosecution witness by showing that he is biased against the defendant is an integral component of confrontation. 415 U.S. at 315-317. Emphasizing the importance of Green's testimony to the prosecution's case and relying upon *Alford* v. *United States*, 282 U.S. 687 (1931), which had upheld a defendant's right to disclose that a witness was being detained in custody at the time of trial and thus may have been eager to "cooperate" with the government in order to have his own charges dropped or reduced, the Court held that denying Davis any opportunity to reveal that Green was on probation required that Davis's conviction be set aside. 415 U.S. at 317-318, 320-321. As the Court concluded, "[Davis] was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " 415 U.S. at 318 (quoting *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), quoting in turn *Brookhart* v. *Janis*, 384 U.S. 1, 3, (1966)).

In so ruling, however, *Davis* did not except from the operation of the harmless error rule all cases in which a defendant is denied an opportunity to impeach a witness for bias. In the first place, *Davis* did not cite, much less distinguish, *Chapman* or any of the Court's other harmless error decisions. Nor did *Davis* explain why an erroneous limitation upon the extent of defense cross-examination should be treated differently from a complete denial of *any* opportunity to cross-examine an adverse witness, which the Court had previously held could be harmless in an appropriate case. See pages 22-24, *infra*. In short, *Davis* can hardly be read to have rejected the application of a well established doctrine that the Court never discussed.[27]

This is especially so since the dictum in *Davis* came only after the Court had painstakingly demonstrated how Davis had in fact been prejudiced. The Court repeatedly stressed the pivotal nature of Green's testimony and the fact that any substantial blow to his credibility would have been fatal to the state's case. Not only was "Green * * * a crucial witness for the prosecution" (415 U.S. at 310), but also "Green's testimony * * * provided 'a crucial link in the proof . . . of [Davis'] act' " (*id.* at 317 (citation omitted); see *id.* at 319). Moreover, given the fact that the proof of Davis's guilt otherwise rested entirely upon circumstantial evidence (*id.* at 310), "[t]he accuracy and truthfulness of Green's testimony were key elements in the State's case against [Davis]" (*id.* at 317). For that reason, the Court observed that "[s]erious damage to the strength of the State's case would have been a real possibility

---

[27] Neither of the cases cited by *Davis* ruled that an erroneous restriction on defense cross-examination cannot be harmless. In *Brookhart*, the defendant was denied the opportunity to cross-examine any of the state's witnesses, and the state offered a confession by an absent witness. The only question was whether the defendant had waived his confrontation right. 384 U.S. at 4-8. In *Smith*, the defendant was denied the right to ask the crucial witness for the state his name and address; that witness's testimony was pivotal because the only issue at trial was the relative credibility of the witness and the defendant. 390 U.S. at 130. In both cases, the error was presumed to be prejudicial; in neither case did the Court discuss whether erroneous restrictions on cross-examination could be harmless in other contexts.

had petitioner been allowed to [impeach Green]." *Id.* at 319. Finally, the Court observed that there was a strong possibility that Green had chosen to rely upon the trial court's ruling that his juvenile records could not be disclosed as a means of giving testimony that "can be regarded as highly suspect at the very least" (*id.* at 314; see *id.* at 313-314).[28] Accordingly, even read with liberality, *Davis* simply holds that the Confrontation Clause entitles a defendant to disclose a known bias on the part of an adverse witness and that denying Davis any such opportunity was prejudicial to his defense.

2. The Court's decisions clearly support the proposition that a Confrontation Clause violation like the one that occurred here can be harmless in an appropriate case. Indeed, that principle was first articulated more than 80 years ago in *Motes* v. *United States*, 178 U.S. 458 (1900). There, the government introduced at trial against all of the co-defendants a transcript of the testimony given at a preliminary hearing by a witness whom the government had allowed to escape from custody prior to trial. The admission of this statement, the Court held, denied each defendant the opportunity to cross-examine the declarant, in violation of the Confrontation Clause, requiring reversal of the convictions of all but one co-defendant. 178 U.S. at 471-474. Reversal of that defendant's conviction was unwarranted, however, because he had testified at trial that he was solely responsible for the crime. *Id.* at 474-475. Given his sworn admission of his guilt, the Court held that "[i]t would be trifling with the administration of the criminal law to award him a new trial" (*id.* at 476).

---

[28] During cross-examination of Green, the defense elicited the fact that Green had been questioned by the police regarding the burglary of the bar. 415 U.S. at 312-313. However, Green denied that he had ever before been subject to a similar interrogation. *Id.* at 313. The trial court cut off any further questioning along this line on the basis of its pretrial ruling regarding the admissibility of Green's juvenile records. *Ibid.* This Court noted that, given the likelihood that Green had been questioned in some manner in connection with his arrest for the burglaries on which Green had been adjudged a juvenile delinquent, "it is doubtful whether the bold 'No' answer would have been given by Green absent a belief that he was shielded from traditional cross-examination" (*id.* at 314).

More recently, the Court has reaffirmed that principle in a series of cases holding that the admission of a confession made by a nontestifying co-defendant, in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968), can be harmless. *Bruton* held that the receipt in evidence at a joint trial of a confession made by a nontestifying co-defendant that incriminated Bruton but was inadmissible as to him deprived Bruton of the right to cross-examine an adverse witness. However, despite the fact that admission of such potentially unreliable evidence could have a "devastating" effect (391 U.S. at 136), constitutes a " 'serious flaw[ ] in the fact-finding process at trial' " (*Roberts* v. *Russell*, 392 U.S. 293, 294 (1968) (citation omitted)), and poses "a serious risk that the issue of guilt or innocence may not have been reliably determined" (*id.* at 295), the Court has made clear that the admission of a co-defendant's confession in violation of *Bruton* does not invariably call for reversal. For instance, in *Harrington* v. *California*, 395 U.S. 250 (1969), the Court found harmless the receipt of two confessions made by nontestifying co-defendants because the proof of the defendant's guilt was "so overwhelming" that the error was necessarily harmless unless every constitutional error requires reversal, a proposition that the Court had squarely rejected in *Chapman*. See 395 U.S. at 254. *Schneble* v. *Florida*, 405 U.S. 427 (1972), and *Brown* v. *United States*, 411 U.S. 223 (1973), expressly reaffirmed the ruling in *Harrington*. See also *Parker* v. *Randolph*, 442 U.S. 62, 77-81 (1979) (opinion of Blackmun, J.); *Dutton* v. *Evans*, 400 U.S. 74, 91-93 (1970) (Blackmun, J., concurring); cf. *Rushen* v. *Spain*, 464 U.S. at 117-118 & n.2 (right to presence at trial). As a plurality of the Court summarized in *Parker*, "[i]n some cases, the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission so insignificant by comparison, that it is clear beyond a reasonable doubt that introduction of the admission at trial was harmless error." 442 U.S. at 70-71 (footnote omitted). *Motes* and *Harrington* thus make clear that denial of the opportunity to cross-examine an

adverse witness does not fit within the limited category of constitutional errors that must be deemed prejudicial in every case.[29]

3. There is a sound basis for this result. Whether denying a defendant the opportunity to impeach an adverse witness will affect the reliability of the fact-finding process at trial is dependent upon a host of factors, such as the nature of the testimony that the witness has given, the nature and strength of the basis for challenging his credibility, the extent of cross-examination otherwise afforded the defendant, the presence or absence of corroboration provided by the testimony of other witnesses or by physical or documentary evidence, and the defense offered at trial.[30] Showing that a witness is under indictment for an unrelated crime or is personally related to the victim may be invaluable where the case is simply a "swearing match" between the witness and the defendant; it will be of little or no benefit where the government's proof rests largely upon documentary or physical evidence or where the defense is insanity. Impeaching a witness's credibility may be devastating to the state's case

[29] Other decisions make the same point in a different but analogous context. It is firmly settled that the deliberate use of perjured testimony – a more egregious impropriety than anything that occurred here – does not require that a conviction be set aside unless "there is a[ ] reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States* v. *Agurs*, 427 U.S. 97, 103 (1976) (footnote omitted); see *United States* v. *Bagley*, slip op. 10-12, & nn.8-9; *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (quoting *Napue* v. *Illinois*, 360 U.S. 264, 271 (1959)). This standard applies both to the introduction of perjured testimony and to the knowing failure to correct such testimony when offered by a witness (*Giglio* v. *United States*, *supra*; *Napue* v. *Illinois*, *supra*). It appears functionally equivalent to the *Chapman* harmless error standard. See *Bagley*, slip op. 10-12 & n.9. If the government's failure to disclose that a witness has committed perjury does not automatically require reversal, it logically must follow that denying the defense the opportunity to impeach a witness for bias should not automatically require reversal.

[30] See, *e.g.*, *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 8-9; see generally *McCormick's Handbook of the Law of Evidence* § 40 (E. Cleary 2d ed. 1972) (describing various types of bias).

where that witness's testimony is the only evidence establishing an essential element of the crime, but discrediting that witness will have little effect on the jury if his testimony is cumulative of the testimony given by several other witnesses.

The government will also often have a substantial interest in keeping secret certain facts that the defense wishes to elicit on cross-examination, such as the identity of a government informant, and it is well-settled that the strength of the government's countervailing interest must be considered before disclosure can be ordered.[31] The Court has recognized, however, that there is no reason to set aside a conviction if disclosure of the sought-after information could not have contributed materially to the verdict.[32] Indeed, even where the government has no such interest in secrecy and simply fails to reveal exculpatory information requested by the defense, including material useful to impeach a witness, reversal is not required unless the sought-after information is likely to have affected the outcome of the trial.[33] It necessarily follows from these cases that it cannot rationally be presumed that the refusal to allow the defense to impeach an adverse witness with such information is so prejudicial as to call for reversal without any consideration of the weight of the state's proof or the significance to the case of the witness's testimony.

To be sure, cross-examination is the primary Confrontation Clause guarantee (see, *e.g*, *Pointer* v. *Texas*, 380 U.S. 400, 407 (1965)) and functions, in Dean Wigmore's oft-quoted phrase, as the "greatest legal engine ever invented for the discovery of truth" (5 J. Wigmore, *Evidence in Trials at Common Law* § 1367, at 32 (1974)). Impeaching a witness for bias

[31] See, *e.g.*, *Davis* v. *Alaska*, 415 U.S. at 319-321 (juvenile records privilege); *Smith* v. *Illinois*, 390 U.S: at 133-134 (White, J., concurring) (inquiries "which tend to endanger the personal safety of the witness" may be foreclosed); *Roviaro* v. *United States*, 353 U.S. 53 (1957) (informant's identity); *United States* v. *Harley*, 682 F.2d 1018, 1020-1021 (D.C. Cir. 1982) (surveillance location).

[32] See *United States* v. *Valenzuela-Bernal*, 458 U.S. at 867-871; *Rugendorf* v. *United States*, 376 U.S. 528, 534-536 (1964); *Roviaro* v. *United States*, 353 U.S. at 64-65.

[33] See *United States* v. *Bagley*, slip op. 10, 14-15; see also *California* v. *Trombetta*, No. 83-305 (June 11, 1984), slip op. 9.

is also a powerful means of discrediting his testimony. See *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 6-9; *Davis*, 415 U.S. at 316; *Alford*, 282 U.S. at 692. Nonetheless, impeachment is simply a means to an end and is not valued for its own sake.[34] A defendant who is denied the opportunity to impeach a prosecution witness still has several other means at his disposal to convince the jury that the witness should be disbelieved,[35] and the ability to use those alternatives before the jury must be given weight under the Confrontation Clause.[36] The evidence against a defendant in a

[34] Cf. *Cronic*, slip op. 9-10 (right to counsel). That is clear from the Court's rulings that certain types of hearsay statements are so reliable that they can be admitted at trial despite the fact that the defendant has had no opportunity to cross-examine the declarant. *Ohio* v. *Roberts*, 448 U.S. at 66; see also *Dutton* v. *Evans*, 400 U.S. 74, 89 (1970) (plurality opinion); *Mattox* v. *United States*, 156 U.S. 237, 243-244 (1895); Fed. R. Evid. 803(1)-(23), 804(b)(1)-(4).

[35] There are five chief methods of attacking a witness's credibility: (1) showing a defect in his capacity to observe or remember the subject of his testimony; (2) demonstrating the witness's bias against the defendant or in favor of the government; (3) introducing prior inconsistent statements made by the witness; (4) showing that the witness's character is generally untrustworthy; and (5) proving that the substance of his testimony is false. See *McCormick's Handbook of the Law of Evidence*, *supra*, § 33, at 66. Denying a defendant the opportunity to impeach a witness for bias still allows the defendant several other alternatives. For instance, respondent was able to elicit the fact that Fleetwood was heavily intoxicated that evening, which would have certainly affected Fleetwood's ability to see respondent in Pregent's apartment (III Tr. 60).

[36] Confrontation at trial helps to assure the reliability of the factfinding process in several related ways. By requiring a witness to testify under oath, it reinforces the seriousness of the proceeding, makes lying more difficult, given the presence of the defendant, and guards against perjury through the threat of a subsequent prosecution. By permitting the accused to cross-examine a witness, it allows the defendant to challenge the witness's credibility. And by permitting the jury to assess the witness's demeanor, it provides the jury with the opportunity to determine whether the witness is credible. See *Ohio* v. *Roberts*, 448 U.S. at 63-64 & n.6; *California* v. *Green*, 399 U.S. 149, 158 (1970). The trial judge's ruling here, of course, limited respondent's opportunity to convince the jury that Fleetwood was lying. Nonetheless, because Fleetwood was on the stand and was subject to cross-examination in other respects, the purposes confrontation serves were not wholly vitiated by the trial court's ruling.

given case may also be so overwhelming or, as here, the testimony offered by a particular witness so slight, uncontroversial, or amply corroborated that an appellate court can safely say that the restriction, even if erroneous, has not denied the defendant a fair opportunity to establish his innocence. Accordingly, there is no basis for concluding that an erroneous restriction upon defense cross-examination is inherently prejudicial.

CONCLUSION

The judgment of the Supreme Court of Delaware should be reversed.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General
STEPHEN S. TROTT
Assistant Attorney General
ANDREW L. FREY
Deputy Solicitor General
PAUL J. LARKIN, JR.
Assistant to the Solicitor General
VINCENT L. GAMBALE
Attorney

SEPTEMBER 1985